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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1340

ANTHONY ACARINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Anthony Acarino requests that a writ of certiorari issue to review the judgment of the United States Court for the Second Circuit, dated March 18, 1969.

Opinion Below

The opinion of the Court of Appeals is not yet reported. See Appendix A. The unpublished opinion of the District Court set forth as Appendix B.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 18 U.S.C. 1254(1).

The judgment of the United States Court of Appeals was entered March 18, 1969.

Questions Presented

1. Was it a violation of due process, and contrary to the decisions of this Court in Brady vs. Maryland, 373 U.S. 83, and Giles vs. Maryland, 383 U.S. 66, for the prosecutor ex parte to suppress from both the court and the defense, that its key witness, a former federal narcotic agent, who was the arresting officer who in fact made the contested seizure of the narcotics, had been twice indicted for larceny, and was awaiting trial on these charges?

2. Did the trial court err in its instructions to the jury on the meaning of reasonable doubt when it declined to use the language "hesitate to act", as required by this Court's decision in Holland vs. United States, 348 U.S. 121, 140?

3. Was the decision of the District Court, in denying the defense motion to suppress the fruits of a warrantless search, contrary to the decisions of this Court in Aguilar vs. Texas, 378 U.S. 108, and Spinelli vs. United States, 89 S.Ct. 584, 37 LW 4110, when the arresting agent's information was supplied by an informer, who himself lacked personal knowledge, that the petitioner was in fact in possession of narcotics?

Constitutional Provisions Involved

The Fourth Amendment, and the due process clause of the Fifth Amendment, are well known to the members of this Court.

Statement

Anthony Acarino was convicted for possession of heroin.

While driving his automobile, on the evening of October 22, 1965, in Brooklyn, New York, Acarino was arrested by four federal narcotic agents. One of them, Franklin Bishop, searched his automobile, and found on the floor of the rear a package containing the narcotics.

1. Some time after the trial, and prior to the date of sentencing, the petitioner applied for a new trial, on the ground that the prosecution had failed to inform either the trial court or the defense that one of its witnesses to the arrest, and the one who actually made the contested search and seizure, Franklin Bishop, a former narcotics agent, had been indicted on two occasions for grand larceny in the New York State Supreme Court. The trial court conducted an evidentiary hearing, at which it was brought out that prior to taking the witness stand, Bishop had told the prosecutor that he was under two indictments in the state courts. The government attorney did not so inform either the court or the defense.

In its opinion the Court of Appeals states:

> "The prosecuting attorney was correct in his apparent assumption that such evidence of misconduct as an indictment is not normally admissible for impeachment purposes. Appellant, however, argues that the government 'built up' Bishop's credibility by eliciting the various 'positions of trust and responsibility' he had held, a stratagem which the trial judge, had he known of the pending indictments, might not have allowed. This 'build-up' consisted of six questions, the answers to which indicated that

Bishop had been employed by the Federal Bureau of Narcotics for about three years, was thereafter an investigator for the New York Buildings Department, and was presently an insurance adjuster. Appellant contends that the resulting impression of unblemished respectability was particularly unfair because Bishop, the agent who allegedly found the packet of narcotics, was the crucial government witness, and the defense claimed that he had in fact planted the packet.

We do not find this argument persuasive. The brief outline of Bishop's employment background alone could scarcely have had a significant effect on the jury's determination. Moreover, even if the fact that Bishop was under indictment had been introduced, the trial judge found, and we agree, that the result would have been no different. See *United States* v. *Costello,* 255 F.2d 876, 879 (2d Cir.), cert. denied, 357 U.S. 937 (1958). Finally, we see no merit in appellant's claim that even absent a showing of prejudice, the fact that the prosecution suppressed information as to the indictments was in itself a violation of due process. The conduct of the prosecution here did not involve deliberate falsification, cf. *Kyle* v. *United States,* 297 F.2d 507, 513-15 (2d Cir. 1961), but, at the worst, faulty judgment.

* * * * *

We do not express approval of the decision of the assistant not to inform the court and the defense of his discovery that a key witness was under indictment. Here, however, where the attorney acted in good faith and the undisclosed evidence had minimal probability of affecting the result of the trial, there is no justification for ordering a new trial."

2. At the trial, when instructing the jury as to the meaning of reasonable doubt, the district judge failed to use the language "hesitate to act".

In its opinion the Court of Appeals stated:

> "Finally, Judge Mishler stated that: 'Proof beyond a reasonable doubt is such as you would be willing to rely on in the most important of your affairs.' Appellant argues that the judge should have used the more familiar 'hesitate to act' test; e.g., 'a reasonable doubt is not a vague, speculative, imaginary doubt but such a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves.' See *United States* v. *Johnson, supra,* 343 F.2d at 6. Following the Supreme Court's lead in *Holland* v. *United States,* 348 U.S. 121, 140 (1954), we have often suggested use of the latter concept, e.g., *United States vs. Bilotti,* 380 F.2d 649, 654 (2d Cir.) cert. denied, 389 U.S. 944 (1967); *United States* v. *Nuccio,* 373 F.2d 168, 174-75 (2d Cir.) cert. denied, 387 U.S. 906 (1967). We do so again, reiterating what we said in *Nuccio*: 'the 'hesitate' language makes the point considerably better.' 373 F.2d at 175. However, no reversible error, plain or subtle, was committed."

3. Prior to trial the District Court conducted an evidentiary hearing on the defense motion to suppress, and denied the application to quash the warrantless search. The trial judge found probable cause for the arrest, and held the search to be incidental.

Two arresting officers (Hughs and Telb) testified at the suppression hearing that an unnamed informer had told them that Acarino was in possession of narcotics that eve-

ning, and was going to make a delivery that night. Neither agent testified that the informer told them the source of his information. The agents did testify that the petitioner, had been under surveillance for several months, and that on one occasion several months earlier, he was seen apparently receiving money from a known drug peddler on the street. On the night in question, Acarino drove in a manner which the agents claim was designed to avoid a tail which he may have suspected.

In its opinion the Court of Appeals stated:

> "In addition, the informer here, as in *Draper* v. *United States,* 358 U.S. 307 (1959), gave the agent a precise prediction of a crime about to occur, unlike *Spinelli* where the information was a more generalized description of criminal activity. Moreover, agent Telb testified that the informer had said that he 'personally knew' that the described delivery was to be made. This emphasis, along with the detailed nature of the information given, suggests that the informer was disclosing firsthand knowledge, rather than a 'suspicion,' 'belief' or 'mere conclusion,' *Aguilar,* 378 U.S. at 114, or 'a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation,' *Spinelli,* 37 U.S.L.W. at 4112. Finally, in *Spinelli,* not only was no statement made as to the source of the informer's information but no reason was given for the agent's assertion that the informant was generally reliable, a fact conceded here. Therefore, we do not find impressive the argument that *Aguilar* and *Spinelli* require us to reverse this conviction.
>
> * * * * *
>
> For it is soundly established that an informer's report which itself fails to establish probable cause may be sufficiently corroborated by independent ob-

servation of a suspect's conduct, if the latter tends to confirm the information in the report or otherwise to support a conclusion that the suspect is engaged in committing a crime. See, e.g., *McCray* v. *Illinois*, 386 U.S. 300 (1967), as construed by *Spinelli*, 37 U.S.L.W. at 4113 n.7; *Draper* v. *United States*, supra; In the present case, the credibility of the informer's report was reinforced by appellant's conduct both before and after the informer's urgent telephone call. Before it was received, the agents' observations of appellant receiving money from a known narcotics violator, patronizing establishments known to be frequented by dealers in narcotics, and transferring his license plates less than two days before the purported delivery attempt all supported the inference that appellant was engaged in illegal activities. Immediately after the informer's call, appellant left the building approximately half an hour before the delivery was reportedly scheduled, engaged in evasive driving, and just prior to arrest apparently tried to dispose of a small shiny object in his hand. We hold that the enmulative effect of the agents' past observation, the informer's report, and the consistency of appellant's actions with the report was sufficient to establish probable cause that appellant, when arrested, was engaged in a violation of the narcotics laws."

Reasons for Granting the Writ

1. The ex parte decision of the prosecutor not to inform the trial court and the defense that the government's key witness, once a federal narcotic agent, was now under two indictments, was a suppression of material information that

should have been shared with others, and was contrary to the decisions of this Court in *Brady* vs. *Maryland,* 373 U.S. 83, and *Giles* vs. *Maryland,* 383 U.S. 66. The opinion of the Court of Appeals that the prosecution "acted in good faith", and that the undisclosed evidence had minimal probability of effecting the result of the trial" is both apologetic and naive, and ignores the basic tenents of the advisary system. Just recently in *United States* vs. *Alderman,* 37 LW 4189, 89 S. Ct. 961, this Court emphasized its philosophy that prosecutors in trial courts just cannot decide for themselves what is of value to the defense, without affording inspection to the defense. It is important to the criminal justice system to emphasize to prosecutors they just cannot play the cards close to the vest, and suppress material information because in their judgment it is not sufficient to change defeat into victory. Suppression always undercuts the proper function of the trial to decide the facts. Prosecutors must be reminded that the price of suppression must be the conviction they unfairly secured. The exclusionary rule of *Mapp* and *Miranda* was mandated by the necessity to take strong steps to assure prosecution compliance. The same exacting standards are required in this area.

2. In a series of cases the Court of Appeals for the Second Circuit has failed to require its district judges to use the proper language of reasonable doubt as ennunciated by *Holland* vs. *United States,* 348 U.S. 121,140 — "hesitate to act". Time after time the Court of Appeals has reminded its district judges of the teachings of *Holland,* but each time has failed to enforce this Court's decision. In *United States* vs. *Nuccio,* 373 F2d 168, 174-75, *United States* vs. *Bilotti,* 380 F.2d 649, 654, *United States vs. Hart,* —— F.2d ——

(2/27/69, slip opinion pp. 1325, at 1331 - 1332), and in this case, the Court of Appeals continues to permit its district judges to deviate from *Holland,* while admonishing them not to do so. It is important that this Court compel compliance with its decisions.

3. The suppression issue presents the problem of separating the wheat from the chaff. The Court of Appeals focused on the inconsequential aspects of the petitioner's activities—some three months earlier he was seen with a known drug seller; he changed his license plates; he drove not as the crow flys.

Neither agent testified that the informer told them the source of his information. The law is well established that although probable cause may be based on hearsay testimony, that testimony must be based on the personal observation of the absent witness. *United States vs. Soyka,* 349 F.2d 443, 447 (CA-2, 1968).

Agent Telb testified at the suppression hearing that the informer told him:

> "He told me that he knew, he personally knew that a colored male by the name of Henry C., who was one of our suspects at that particular time suspected of being involved in narcotics traffic, he told me that he personally knew that Henry C. was going to receive a delivery of a sample of heroin from Anthony Acarino around 9:00 o'clock that night, and that Acarino had the stuff with him wherever he was." A. 5

By sheer semantics the Court of Appeals concluded that the informer did know firsthand of the activities of Acarino.

The record shows the informer "personally knew" of the activities of Henry C., by his own sayso, but only knew of Acarino by hearsay. Nor did the government, who had the burden to establish the propriety of this warrantless arrest, ever develop for the record what the agent meant when he said "personally knew". As such the record does not show the informer was privy to any conversation with or observation of Acarino, and so we lack the basis of crediting the hearsay.

It is important this Court insure compliance with *Aguilar* and *Spinelli,* and not permit the requirement that the informer have personal knowledge to be relaxed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1969.

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 125—September Term, 1968.

(Argued February 6, 1969 Decided March 18, 1969.)

Docket No. 32421

UNITED STATES OF AMERICA,

Appellee,

—against—

ANTHONY ACABINO,

Appellant.

Before:

ANDERSON and FEINBERG, *Circuit Judges,*
and MANSFIELD, *District Judge.**

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* Of the Southern District of New York, sitting by designation.

Appeal from judgment of conviction for violation of the federal narcotics laws, 21 U. S. C. §174 and 26 U. S. C. §4704(a), after a trial by jury before Jacob Mishler, *J.*, in the United States District Court for the Eastern District of New York. Affirmed.

JEROME LEWIS, New York, N. Y. (H. Elliot Wales, on the brief), *for Appellant.*

JEROME C. DITORE, Assistant United States Attorney (Joseph P. Hoey, United States Attorney for the Eastern District of New York, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

Anthony Acarino appeals from a judgment of conviction after a jury trial and from denial of a motion for a new trial by Jacob Mishler, *J.*, in the United States District Court for the Eastern District of New York. Appellant was convicted on one count of concealing heroin in violation of 21 U. S. C. §174 and one count of purchasing heroin in violation of 26 U. S. C. §4704(a), and was sentenced to ten years on each count, sentences to run concurrently. In seeking reversal, appellant claims that admission of crucial evidence against him was improper because it was seized after an arrest not based on probable cause, that the prosecutor suppressed material evidence, and that the trial judge erroneously instructed the jury on the meaning of reasonable doubt. We will consider these claims in turn.

I. *Probable cause for the arrest*

According to testimony before Judge Mishler: In July 1965, appellant, then known to federal narcotics agents as "Babe," was placed under surveillance after the agents received information that a white man of Italian extraction called "Babe" was selling heroin to various narcotics peddlers in Brooklyn. During the following months, appellant was seen meeting a known drug peddler on the street, re-

ceiving a sum of money from him, and frequenting various bars and grills known to be used by narcotics traffickers. On October 21, 1965, he was observed transferring the license plates from his Cadillac convertible to a Lincoln convertible. On the following evening, at about 8:15 P.M., while maintaining surveillance of appellant, agent Telb received a telephone call from a previously reliable informant. The informer told Telb that appellant was to make a delivery of heroin around 9 P.M. that night to a negro male known as Henry C., a suspected narcotics violator, in the Bedford-Stuyvesant area of Brooklyn, and that appellant would have the narcotics in his possession. At about 8:30 P.M., appellant emerged from a building at 2045 84th Street, in Brooklyn, got into the Lincoln and drove off. Telb and three other agents, Hughs, Bishop and Guy, followed. Appellant drove in an evasive fashion, going around several blocks, stopping and starting, and running through two red lights. At the intersection of Bedford Avenue and Avenue J in Brooklyn, when appellant stopped for a red light, the agents cut off his car. The agents saw appellant move his hand towards the partially open window on his side and noticed a small shiny object in his hand. The agents arrested appellant, and agent Bishop searched the rear of the car and there found a waxed packet containing narcotics.[1]

Prior to trial, appellant moved to suppress this evidence. After an evidentiary hearing, Judge Mishler denied the

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[1] Hughs testified that Bishop said "I found it" or "here is the stuff" and held up something in his hand. Similarly, Telb testified that Bishop said "I found the stuff" and had a shiny package in his hand.

motion on the ground that the agents had probable cause to make the arrest,[2] which the search was a proper incident. Appellant contends that this ruling was incorrect, relying largely on *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 37 U. S. L. W. 4110 (U. S. Jan. 27, 1969). Under the principles there formulated, an informer's report alone does not establish probable cause[3] unless the informer conveys enough of the basis of his information to permit an assessment of its validity and unless there are circumstances which manifest the general credibility or reliability of the informant. Appellant's brief in this court concedes that on the basis of the agents' testimony before Judge Mishler, they properly regarded the informer as reliable. Indeed, the informer had furnished information which led to convictions five times before. Therefore, our inquiry is confined to the basis of his statement that appellant was to make a delivery of heroin within

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[2] Although neither party has mentioned it, apparently the governing statute is 26 U. S. C. §7607(2), which provides that agents of the Bureau of Narcotics may:

> make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

"Reasonable grounds" means substantially the same as "probable cause." See *Draper* v. *United States*, 358 U. S. 307, 310 n. 3 (1959).

[3] Both *Aguilar* and *Spinelli* involved the sufficiency of applications to obtain search warrants, but the latter opinion notes, 37 U. S. W. L. at 4112 n. 5, "the analysis required for an answer to this question [probable cause for an arrest without a warrant] is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue."

the hour to a particular recipient. The information conveyed to the agent here was more specific than that referred to in *Aguilar,* in which the officers' affidavit recited only that they:

> have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.

378 U.S. at 109. Cf. *United States ex rel. Cunningham* v. *Follette,* 397 F. 2d 143, 145 (2d Cir. 1968); *United States* v. *Soyka,* 394 F. 2d 443, 453 (2d Cir. 1968) (*in banc*). In addition, the informer here, as in *Draper* v. *United States,* 358 U.S. 307 (1959), gave the agent a precise prediction of a crime about to occur, unlike *Spinelli* where the information was a more generalized description of criminal activity.[4] Moreover, agent Telb testified that the informer had said that he "personally knew" that the described delivery was to be made. This emphasis, along with the detailed nature of the information given, suggests that the informer was disclosing firsthand knowledge, rather than a "'suspicion,' 'belief' or 'mere conclusion,'" *Aguilar,* 378 U. S. at 114, or "a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation," *Spinelli,* 37 U. S. L. W. at 4112. Fi-

[4] The *Spinelli* affidavit alleged that the FBI "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136." 37 U. S. L. W. at 4111.

nally, in *Spinelli,* not only was no statement made as to the source of the informer's information but no reason was given for the agent's assertion that the informant was generally reliable, a fact conceded here. Therefore, we do not find impressive the argument that *Aguilar* and *Spinelli* require us to reverse this conviction.

However, as in *Cunningham* and *Soyka, supra,* we need not decide whether the informer's report, standing alone, would have constituted probable cause for the arrest. For it is soundly established that an informer's report which itself fails to establish probable cause may be sufficiently corroborated by independent observation of a suspect's conduct, if the latter tends to confirm the information in the report or otherwise to support a conclusion that the suspect is engaged in committing a crime. See, e.g., *McCray* v. *Illinois,* 386 U. S. 300 (1967), as construed by *Spinelli,* 37 U. S. L. W. at 4113 n. 7; *Draper* v. *United States, supra; United States ex rel. Cunningham* v. *Follette, supra; United States* v. *Soyka, supra; United States* v. *Repetti,* 364 F. 2d 54 (2d Cir. 1966). In the present case, the credibility of the informer's report was reinforced by appellant's conduct both before and after the informer's urgent telephone call. Before it was received, the agent's observations of appellant receiving money from a known narcotics violator, patronizing establishments known to be frequented by dealers in narcotics, and transferring his license plates less than two days before the purported delivery attempt all supported the inference that appellant was engaged in illegal activities. Immediately after the informer's call, appellant left the building approximately half an hour before the delivery was reportedly scheduled, engaged in

evasive driving, and just prior to arrest apparently tried to dispose of a small shiny object in his hand. We hold that the cumulative effect of the agents' past observation, the informer's report, and the consistency of appellant's actions with the report was sufficient to establish probable cause that appellant, when arrested, was engaged in a violation of the narcotics laws.

II. *Suppression of evidence*

Appellant's second argument is based on his discovery, shortly after conviction, that when agent Bishop testified for the Government he was then under two indictments in the New York Supreme Court for crimes relating to the sale of a stolen car. On the morning that Bishop, then no longer employed by the Government, was to testify, he volunteered to the Assistant United States Attorney that he had been indicted in the state court and that the matter was still pending.[5] The assistant did not communicate this information either to the trial judge or to the defense, presumably on the assumption that it could be of no use to the defense and was thus of no relevance to the proceedings. After learning of Bishop's status, appellant moved for a new trial. Judge Mishler denied the motion in an unpublished opinion.

The prosecuting attorney was correct in his apparent assumption that such evidence of misconduct as an indictment is not normally admissible for impeachment purposes. See *United States* v. *Bowe*, 360 F. 2d 1, 14-15 (2d

[5] Although the assistant had heard, prior to the trial, that Bishop was in some kind of difficulty regarding the sale of a stolen car, he was apparently unaware of the indictments.

Cir.), cert. denied, 385 U. S. 961 (1966). Appellant, however, argues that the Government "built up" Bishop's credibility by eliciting the various "positions of trust and responsibility" he had held, a stratagem which the trial judge, had he known of the pending indictments, might not have allowed. This "build-up" consisted of six questions,[6] the answers to which indicated that Bishop had been employed by the Federal Bureau of Narcotics for about three years, was thereafter an investigator for the New York Buildings Department, and was presently an insurance adjuster. Appellant contends that the resulting impression of unblemished respectability was particularly unfair because Bishop, the agent who allegedly found the packet of narcotics, was the crucial government witness, and the defense claimed that he had in fact planted the packet.

We do not find this argument persuasive. The brief outline of Bishop's employment background alone could scarcely have had a significant effect on the jury's deter-

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[6] These questions were as follows:

Q. Mr. Bishop, what is your occupation? A. My occupation, currently, currently I am assigned as an insurance adjuster for an organization called the General Adjustment Bureau.

Q. Where are they located? A. The office I am assigned to is in Pearl River, New York.

Q. Were you ever employed by the Federal Bureau of Narcotics? A. Yes, sir, I was.

Q. During what period of time, approximately. A. Approximately 1963 through the middle of 1966.

Q. When you left the Federal Bureau of Narcotics where did you go? A. From the Bureau of Narcotics I went to the Investigation Section of the Department of Buildings of the City of New York.

Q. After that you went into the insurance business; is that right?

mination. Moreover, even if the fact that Bishop was under indictment had been introduced, the trial judge found, and we agree, that the result would have been no different.[7] See *United States* v. *Costello*, 225 F. 2d 876, 879 (2d Cir.), cert. denied, 357 U. S. 937 (1958). Finally, we see no merit in appellant's claim that even absent a showing of prejudice, the fact that the prosecution suppressed information as to the indictments was in itself a violation of due process. The conduct of the prosecution here did not involve deliberate falsification, cf. *Kyle* v. *United States*, 297 F. 2d 507, 513-15 (2d Cir. 1961), but, at the worst, faulty judgment. Even assuming that the trial judge might have allowed some use of the indictments against Bishop:

> Failure to appreciate the use to which the defense could place evidence in the prosecution's hands . . . must happen to the most scrupulous prosecutors and . . . the problems of the courts and the wider interests of society unite to require a substantially higher probability that disclosure of the evidence to the defense would have altered the result. To invalidate convictions in such cases because a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties.

United States v. *Keogh*, 391 F. 2d 138, 148 (2d Cir. 1968). We do not express approval of the decision of the assistant not to inform the court and the defense of his discovery

[7] Three other agents testified at trial to substantially the same series of events as did Bishop. The trial judge found that the "proof of guilt was overwhelming," and that the testimony of the defendant, who took the stand in his own behalf, was incredible.

that a key witness was under indictment. This appeal itself emphasizes the proposition that it would have been wiser to disclose such evidence, regardless of the probability that it might be inadmissible. Here, however, where the attorney acted in good faith and the undisclosed evidence had minimal probability of affecting the result of the trial, there is no justification for ordering a new trial. See *United States* v. *Keogh, supra.* Accordingly, we affirm the decision of the district judge on that motion.

III. *Charge on reasonable doubt*

Finally, appellant raises a variety of objections to Judge Mishler's charge on reasonable doubt. Since none was considered sufficiently important to call to the judge's attention at trial, they might be disposed of summarily on that basis. However, appellant claims that their cumulative effect amounted to "plain error" justifying reversal. Accordingly, we will consider them on the merits.

The first complaint is that the judge never told the jury that "a reasonable doubt is a doubt based on reason which arises from the evidence or lack of evidence." The claim is simply unjustified. Judge Mishler instructed the jury that reasonable doubt "is based upon the evidence in the case," and must be based "on the case, the record" rather than on "some emotion" or "sympathy, bias or prejudice." It is true that the judge did not use the exact words appellant now suggests, although he probably would have had the request been timely made. But there is nothing talismanic about appellant's phrasing. The substance of what he now seeks was imparted to the jurors.

Appellant's next point is based on the judge's instruction to the jurors that: "You must be convinced to a *moral certainty* as to the guilt of the defendant before you may find him guilty." (Emphasis added.) In *United States* v. *Byrd,* 352 F. 2d 570, 575 (2d Cir. 1965), we considered an instruction that reasonable doubt "is a doubt to a moral certainty"; we disapproved of it because it tended to create "more confusion than light." However, that type of conjunction of two antithetical terms, "doubt" and "certainty," did not occur here. In *United States* v. *Johnson,* 343 F. 2d 5, 6 (2d Cir. 1965), we reversed a conviction because the judge told "the jury to convict if it arrive[d] at a stage where it is morally convinced of guilt." We felt the instruction was:

> altogether too indefinite. It could be taken to mean morally convinced that it was slightly more likely that defendant was guilty than not, and "morally convinced" might mean by some means other than reason.

However, we went on to say that "To be convinced to a 'moral certainty' would have a somewhat different meaning." That, of course, was the expression used by the judge here. While we do not see why the phrase "moral certainty" should continue to be employed at all, see *United States* v. *Hart,* —— F. 2d ——, slip op. 1325 (2d Cir., Feb. 27, 1969), its use here was not plain error.

Finally, Judge Mishler stated that: "Proof beyond a reasonable doubt is such as you would be willing to rely on in the most important of your affairs." Appellant argues that the judge should have used the more familiar "hesitate to act" test; e.g., "a reasonable doubt is not a vague,

speculative, imaginary doubt but such a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves." See *United States* v. *Johns* on, *supra,* 343 F. 2d at 6. Folowing the Supreme Court's lead in *Holland* v. *United States,* 348 U. S. 121, 140 (1954), we have often suggested use of the latter concept, e.g., *United States* v. *Bilotti,* 380 F. 2d 649, 654 (2d Cir.), cert. denied, 389 U. S. 944 (1967); *United States* v. *Nuccio,* 373 F. 2d 168, 174-75 (2d Cir.), cert. denied, 387 U. S. 906 (1967). We do so again, reiterating what we said in *Nuccio*: "the 'hesitate' language makes the point considerably better." 373 F. 2d at 175. However, no reversible error, plain or subtle, was committed.

Judgment affirmed.

APPENDIX B

Memorandum of Decision and Order

(794) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 66 Cr-68

UNITED STATES OF AMERICA,

—against—

ANTHONY ACARINO,

Defendant.

April 16, 1968.

Defendant, having been found guilty on February 23, 1968, of certain federal narcotics law violation[1], moves, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for an order setting aside the jury's verdict on the basis of newly discovered evidence.

The evidence showed that defendant was arrested in his car on October 22, 1965 by four federal agents—Lee D. Hughs, James A. Telb, Franklin S. Bishop and Edward T. Guy—and that a search of the car incident to the arrest uncovered a packet containing a quantity of heroin. At the time of the arrest, there was an altercation between defendant and Agent Hughs, differing accounts of which were placed before the jury for its consideration.

[1] 21 U.S.C. § 174 (1964) and 26 U.S.C. § 4704(a)(1964).

(795) Defendant has contended throughout that he has been "framed" by the agents; that no heroin was found in his car; and that the agents subjected him to a severe beating in an attempt to persuade him to cooperate with them.

Prior to the actual trial, this court conducted a hearing on defendant's motion to suppress, at which time defendant testified concerning the circumstances that surrounded his arrest. After two days of testimony, the court was convinced that defendant was unworthy of belief, and concluded that both the arrest, and the search incident thereto, had been lawful.

According to the government's version of the events that transpired on the evening of the arrest, the heroin was found in the back of defendant's automobile by Agent Bishop. At one point in the proceedings, however, the government indicated that it did not intend to call Bishop, whom it no longer employs. When defense counsel stated that he would like to call Bishop anyway, but had experienced some difficulty in locating him, the court instructed the government to ascertain Bishop's present address and occupation, so turn such information over to defendant, and to make every effort to make him available to defendant. Moreover, the court told (796) the government that the jury might well be instructed that it could draw on unfavorable inference from the government's failure to call Bishop. As a result, both the government and defendant subpoenaed Bishop, and Bishop appeared as a government witness at the trial.

On March 28, 1968, the date originally fixed for sentencing, defendant made the instant motion. The proffered

evidence was to the effect that two separate indictments have been returned against Bishop in Supreme Court, New York County. One charges him with the sale or attempted sale of a stolen car on or about July 1, 1966, and the other with the receipt of moneys from the sale of a stolen car, said receipt allegedly to have occurred between July 1, 1966 and July 30, 1966. The indictments were filed on November 4, 1966 and December 2, 1966 respectively.

The Assistant United States Attorney has represented to the court that he had heard, prior to the commencement of the trial, that Bishop had become entangled in some difficulty regarding the sale of a stolen car; that he first met Bishop on February 20, 1968, the day Bishop testified at the trial; and that immediately prior to taking the stand, Bishop advised him that he had been "charged" or "indicted" in a state court, (797) and that the matter was still pending. On the other hand, defendant claims that he first became aware of this information shortly after he was convicted.

A jury's determination of a defendant's guilt is not to be lightly brushed aside, *see, United States* v. *Johnson,* 327 U.S. 106, 66 S. Ct. 464 (1946); *United States* v. *Costello,* 255 F. 2d 876 (2d Cir.), *cert. denied,* 357 U.S. 937, 78 S. Ct. 1385 (1958) and the burden of showing a right to relief rests upon the one who is seeking a new trial. *United States* v. *Lombardozzi,* 236 F. Supp. 957 (E.D.N.Y. 1964), *aff'd,* 343 F. 2d 127 (2d Cir.), *cert. denied.* 381 U.S. 938, 85 S. Ct. 1771 (1965). The requirements to be met were set forth in *Costello*:

> (1) that defendant did not know of the evidence until after the trial;

(2) that his failure to know of the evidence sooner was not owing to the want of due diligence;

(3) that the new evidence is so material that it would probably produce a different verdict if a new trial were granted;

(4) that the new evidence is not merely cumulative;

(5) that the witness's affidavit be produced, or its absence accounted for; and

(6) that it is not the only object of the testimony to impeach the character or credibility of a witness.

(798) *United States* v. *Costello,* 255 F. 2d, *supra,* at 879.

While defendant has satisfied the first and second requirements, and the fourth and fifth are not pertinent, the third and sixth requirements preclude relief.

The testimony of the four agents was mutually corroborative and impressive. In opposition thereto, defendant testified in his own behalf, the court preventing the government from examining him as to his extensive prior criminal record of convictions. In short, after hearing the testimony at the trial, and assessing the demeanor of the witnesses, the court feels that the proof of guilt was overwhelming, and that defendant's testimony at the trial in chief was incredulous. If the newly discovered evidence had been available at the trial, and if it had come before the jury, it would not have produced a different result.

In addition, defendant has failed to demonstrate how he could have made use of the subject information. The supporting affidavit contains the bold assertion that "at the very least," defendant could have summoned Bishop's alleged victims to testify concerning Bishop's credibility.

Moreover, defendant suggests that this court would have seen fit, in the exercise of its discretion, to admit evidence of an indictment for impeachment purposes. In this circuit, however, evidence (799) of specific acts of misconduct not resulting in criminal convictions are inadmissible unless it has some relevancy independent of an attack upon the witness's general character. *United States* v. *Bowe,* 360 F. 2d 1 (2d Cir.), *cert. denied,* 385 U.S. 961, 87 S. Ct. 401 (1966). For example, such evidence has been admitted to establish a basis for hostility or some other factor that might motivate one to testify falsely against another. *See, United States* v. *Dardi,* 330 F. 2d 316 (2d Cir.), *cert. denied,* 379 U.S. 845, 85 S. Ct. 50 (1964). The fact that Bishop has been indicted for certain alleged activities wholly unrelated to the charges against this defendant, is a purely collateral matter. The confusion that is likely to be created as a result of any consideration thereof, is to be avoided. *United States* v. *Bowe, supra* at 15.

It is well settled that "[t]he discovery of new evidence which merely discredits a government witness and does not directly contradict the government's case ordinarily does not justify the grant of a new trial." *United States* v. *Aguilar,* 387 F. 2d 625 (2d Cir. 1967). This rule has few exceptions. Thus, in a case where the sole government witness's denial of having been convicted of grand larceny surprised the defense, the trial court, in granting a new (800) trial, remarked that under the particular circumstances the impeaching evidence was of a very serious nature, " . . . *there being no corroboration and no eye witness.*" *United States* v. *Gordon,* 246 F. Supp. 522, 525 (D.D.C. 1965) (emphasis added). The witness's denial meant that he was presented

to the jury as a man with an unblemished record, in contrast to the accused, whose four prior convictions were exposed when he testified in his own behalf. The instant case is clearly distinguishable.[2]

The nondisclosure of impeaching evidence is not violative of due process unless the surrounding circumstances render such nondisclosure fundamentally unfair. *See, Link* v. *United States,* 352 F. 2d 207 (8th Cir. 1965), *cert. denied,* 383 U.S. 915, 86 S. Ct. 906 (1966). This is not a case where (801) the prosecutor intentionally suppressed proof which bore on defendant's innocence. *Cf. Brady* v. *Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963). He believed, in good faith, that he was not required to transmit the information about Bishop to defendant. His silence did not constitute a transgression of "... the basic principles of fair play embodied in the due process clause." *Kyle* v. *United States,* 297 F. 2d 507, 513 (2d Cir. 1961), *cert. denied,* 377 U.S. 909, 84 S. Ct. 1170 (1964).

Finally, defendant's argument that he must be afforded a new trial because testimony from the suppression hearing was used at the trial for impeachment purposes, is without merit. Even if this case did come within the purview of *Simmone* v. *United States,* 88 S. Ct. 967 (1968), the court specifically called cousel's attention to the pendency of that action. Nevertheless, no objection to the use of testimony

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[2] *See also, United States* v. *Kretske,* 220 F. 2d 785 (7th Cir.), *rev'd per curiam,* 350 U.S. 807, 76 S. Ct. 51 (1955), where the trial court denied a motion for a new trial which had been based upon newly discovered evidence that a narcotics agent had a long criminal record. In the Supreme Court, however, the government confessed error. The ground upon which error was confessed is unclear.

from the suppression hearing at the trial in chief was interposed.

Defendant's motion is in all respects denied, and it is

So Ordered.

Jacob Mishler
U. S. D. J.